

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-184416

DATE: January 2, 1976

MATTER OF: Johnson Controls, Inc.

DIGEST:

1. Protester's meeting with agency prior to bid opening concerning allegedly restrictive IFB specifications under circumstances where meeting concerned subject matter of protest and where agency denied protest shortly prior to bid opening was timely protest to agency and, therefore, protest made to GAO within 10 days of initial adverse agency action is timely.
2. Specifications in IFB for utility surveillance system will not be questioned by GAO since it cannot be concluded that specifications were unduly restrictive and not in accordance with specific needs of contracting agency even though protester contends that furnishing of its system is thereby precluded.
3. Contention that since specifications restricted bids to furnishing one manufacturer's system, procurement should have been on sole-source negotiated basis is without merit where agency found no necessity or justification for negotiation and three responsive bids were received.

Johnson Controls, Inc. (Johnson), protests the award of a contract pursuant to invitation for bids (IFB) F49642-75-09248, issued at the Washington Area Procurement Center (WAPC), for the installation of a utility surveillance system for the Air Force at the Andrews Air Force Base, Maryland.

Three bids were received by WAPC at bid opening on June 26, 1975. Johnson did not submit a bid. Prior to bid opening a meeting had been held on June 25, 1975, at the contracting officer's request, between a representative from Johnson and the contracting officer and Andrews Civil Engineering personnel to discuss the alleged restrictiveness of the IFB specifications. After bid closing on June 26, 1975, WAPC received a telex from Johnson protesting the specifications for the installation for work called for under the IFB. On June 28, 1975, the contracting

officer rejected the protest by Johnson and awarded the contract to the low bidder. Thereafter, on July 9, 1975, this Office received a telex dated July 9, 1975, from Johnson protesting the IFB on the grounds that the specifications were unduly restrictive because the Government was required to furnish only a single pair of interconnecting leased lines. It was asserted in this telex that the Government-furnished wiring would not work with the particular control system that Johnson used. Johnson also indicated that the IFB specifications constituted a sole-source procurement and that a sole-source procurement was not justifiable under the circumstances.

The initial issue presented by this protest is whether it was timely filed. The Air Force asserts that Johnson made no attempt to raise the issue of overly restrictive specifications prior to the June 26, 1975, bid closing and that therefore the Johnson protest, in that it was received after bid opening on June 26, 1975, did not meet the timeliness requirements of our Bid Protest Procedures.

This Office's Bid Protest Procedures, § 20.2(a), 40 Fed. Reg. 17979 (1975), applicable to bid protests received by our Office on or after June 2, 1975, require that a protest against alleged improprieties in any type of solicitation which are apparent prior to bid opening must be filed prior to bid opening. If a protest is timely filed initially with the contracting agency, any subsequent protest to this Office will be considered provided, inter alia, that the protest is filed with GAO within 10 working days of formal notification of actual or constructive knowledge of initial adverse agency action. Section 20.2(a), Bid Protest Procedures, supra. Thus, the central question with regard to the issue of timeliness is whether the meeting held on June 25, 1975, prior to the bid opening, constituted a protest.

It is noted that Armed Services Procurement Regulation (ASPR) § 2-407.8 (1975 ed.) permits the filing of an oral protest with an agency. The record does not clearly indicate whether this meeting, called at the contracting officer's request, was intended by Johnson as a protest. However, the file indicates that this meeting was concerned with the restrictiveness of the IFB specifications, and that the representative for Johnson " * * * advised that settling this matter would require * * * an alternate to the Government furnished wiring." Moreover, the file indicates that Johnson was not advised of the outcome of this meeting immediately but was advised of the agency's decision that the specifications could not be changed either later that day or on June 26, 1975,

prior to bid opening. Therefore, it is our opinion that, under these circumstances, the meeting is to be viewed as a protest by Johnson and denial thereof within the context of section 20.2(a), supra. As indicated above, Johnson's protest to our Office was received on July 9, 1975, less than 10 working days after initial adverse agency action. Since Johnson's protest to GAO was made within 10 working days of adverse agency action, it was timely made.

As we have indicated, the thrust of Johnson's protest is that the IFB specifications are unduly restrictive. Specifically, in its July 9, 1975, and subsequent telex communications to GAO, Johnson asserts, among other things, that IFB paragraph TP1-05, which provides in part that "The Government will furnish a single pair of interconnecting leased lines * * * between building 3465, Control Center, and the remote data gathering panels * * *," will not work with Johnson's JC/80 system. It is argued by Johnson that the specifications as written effectively limit the potential subcontractors for this work to the Honeywell, Inc. (Honeywell), system. Johnson further argues that the number of leased lines provided by the Government will require of Johnson, but not of Honeywell, the purchase of a new JC/80 building automation system at a cost in excess of \$50,000. Johnson asserts that because of the restrictive specifications they and other contractors are excluded from submitting a bid based upon the Johnson system.

Additionally, it is Johnson's contention that the specifications, taken as a whole, constitute a sole-source procurement and that the Government should either negotiate for the procurement, or amend the specifications to allow the furnishing of the Johnson system.

The responsibility for drafting proper specifications reflecting the needs of the Government is primarily that of the contracting agency. The procurement statutes and ASPR require that the specifications be drawn so as to permit the greatest amount of competition consistent with the needs of the Government. However, it is well established that the Government does not violate either the letter or spirit of the competitive bidding statutes merely because only one firm can supply its needs, provided the specifications are reasonable and necessary for the purpose intended. 45 Comp. Gen. 365, 368 (1965); B-178288, May 24, 1973; B-172903, July 6, 1971; B-159550, February 13, 1967. Further, this Office will not substitute its judgment for that of the procuring agency

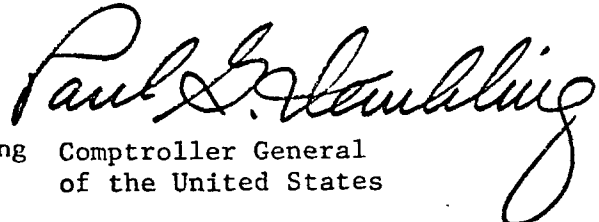
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even where competition is restricted unless there is clear and convincing evidence that the agency opinion is in error and that a contract awarded on the basis of such specifications would, by unduly restricting competition, be a violation of law. 40 Comp. Gen. 294, 297 (1960); see 49 id. 156 (1969); B-178158, May 23, 1973; 53 id. 478, 481 (1974).

In the instant case, the record indicates that the wiring system necessary for Johnson's control system could not be provided by Andrews Air Force Base without causing substantial delay and additional cost to the Government in providing additional wires. Moreover, the record also indicates that providing any additional leased lines would put an added load on the Andrews communications system, thus reducing the Base's capability to handle any additional urgent requirements to support the Base mission. Under these circumstances, we cannot conclude that the IFB specifications were unduly restrictive.

With regard to Johnson's contention that, in lieu of amending the specification, the procurement should have been negotiated on a sole-source basis, the applicable statute, 10 U.S.C. § 2304 (1970), provides that all purchases and contracts shall be made by advertising except in certain enumerated circumstances. Additionally, ASPR § 2-102.1(a) (1975 ed.) states that procurement is to be made by formal advertising pursuant to the applicable statute whenever feasible and practicable, even though such conditions would otherwise satisfy the requirements necessary for procurement by negotiation. See also ASPR § 3-101(a) (1975 ed.). Since the agency found no necessity or justification for negotiating and three responsive bids were received, we find no impropriety in the use of formal advertising procedures.

In accordance with the above, the protest is denied.


Acting Comptroller General
of the United States